UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NOS. 29-CA-177992, 29-CA-179767, 29-CA-184505

PrimeFlight Aviation Services, Inc.,

Respondent,

and

Service Employees International Union Local 32BJ,

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Dated: May 15, 2017

Frank Birchfield, Esq.
1745 Broadway, 22nd Floor
New York, NY 10019
Telephone: (212) 492-2518
Facsimile: (212) 492-2501
william.birchfield@ogletreedeakins.com

Attorneys for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

State Statutes

INTRODUCTION

Counsel for the General Counsel ("CGC") has alleged that Respondent PrimeFlight Aviation Services, Inc. ("PrimeFlight" or "Respondent") violated Section 8(a)(1) and 8(a)(5) of the National Labor Relations Act ("NLRA" or the "Act") by: (1) refusing to recognize Service Employees International Union Local 32BJ ("Charging Party," "SEIU 32BJ," or the "Union") as the bargaining representative for PrimeFlight's employees at John F. Kennedy International Airport ("JFK"), where PrimeFlight provides certain airline support services to JetBlue Airways Corporation ("JetBlue"); and, (2) refusing to provide information to SEIU 32BJ relevant to the union's role as the bargaining agent for PrimeFlight employees. The CGC's theory is that PrimeFlight is a successor employer to a prior employer that had recognized SEIU 32BJ. At the hearing below, Administrative Law Judge Mindy Landow ("ALJ") ruled in favor of the CGC on demonstrably improper grounds.

As the evidence in the record shows, PrimeFlight is not an "employer" under the National Labor Relations Act ("NLRA"). Under the longstanding analytical model of the National Labor Relations Board ("NLRB"), PrimeFlight is a derivative carrier under the Railway Labor Act ("RLA"), meaning PrimeFlight contracts with a transportation carrier subject to the RLA and is under the control of that carrier to the extent that PrimeFlight meets the test for RLA jurisdiction. Under the NLRB's model, the NLRB defers to the test established by the National Mediation Board ("NMB"), the agency charged with interpreting and enforcing the RLA. For decades, the NMB has hewed to an analysis under which PrimeFlight easily qualifies for RLA jurisdiction: PrimeFlight's employees perform jobs traditionally performed by RLA carriers, and PrimeFlight is under the direct and indirect control of an RLA carrier.

Even assuming for the sake of argument, however, that PrimeFlight is subject to the NLRA, the General Counsel failed to show PrimeFlight is a successor employer. PrimeFlight

demonstrated at the hearing that it did not attain a substantial complement of employees until several weeks after SEIU 32BJ demanded recognition as the bargaining agent, by which time the predecessor employees formerly represented by SEIU 32BJ constituted only a minority of PrimeFlight's employees. Therefore, even assuming PrimeFlight is an employer subject to the NLRA, it is not a successor in this factual context and, therefore, not obligated to recognize or bargain with the Union or to provide the Union information.

STATEMENT OF THE CASE

SEIU 32BJ filed three separate unfair labor practice charges with Region 29 of the National Labor Relations Board, beginning with Case No. 29-CA-177992 on June 10, 2016.[1] Cases 29-CA-179767 and 29-CA-184505 were filed on July 11, 2016 and September 15, 2016 respectively. The Regional Director issued an Order Further Consolidating Cases, an Amended Consolidated Complaint and Notice of Hearing ("Amended Complaint") on October 3, 2016 alleging violations of the Act through (a) Respondent's refusal to recognize and bargain with Charging Party; (b) Respondent's refusal to provide certain information to Charging Party, as set forth in more detail in Respondent's Statement of Facts below; (c) Respondent's alleged unilateral changes to certain terms and conditions of employment, as set forth in more detail in Respondent's Statement of Facts below; and (d) Respondent's alleged threats to certain of Respondent's employees to inhibit their support for Charging Party. On October 17, 2016, Respondent filed its Answer to the Amended Complaint.

The Hearing was held before Administrative Law Judge Mindy E. Landow on October 18, 19 and 20, 2016 in Brooklyn, New York. On March 9, 2017, the ALJ issued her decision, finding that (1) Respondent was properly subject to the NLRB's jurisdiction under

[1] References to the hearing transcript appear as "Tr. ." References to the General Counsel's, and Respondent Employer's Exhibits appear respectively as "GC Ex. __", and "Er. Ex. __". Joint exhibits appear as "Jt. Ex. __".

the National Labor Relations Act; (2) Respondent was the successor employer of a bargaining unit of employees represented by Charging Party; and (3) Charging Party represented a majority of Respondent's employees at such time as Respondent had hired a substantial complement of its workforce, and therefore Charging Party had the right to be recognized by Respondent and to bargain on behalf of Respondent's employees; (4) Respondent had unlawfully refused to recognize, bargain with, and provide certain information to Charging Party; and (5) Respondent unlawfully threatened certain of its employees with discharge to discourage their support for Charging Party.

QUESTIONS INVOLVED

1. Did the ALJ err in finding that Respondent is subject to jurisdiction under the National Labor Relations Act instead of the Railway Labor Act? [Exceptions 1, 2, 3, 4, 5, 6, 12, 13, 14, 15, 16, 17, 18, 19, 20]

2. Did the ALJ err in finding that Charging Party represents a bargaining unit of Respondent's employees at JFK International Airport because Respondent is a successor employer bound by its predecessor's bargaining relationship with Charging Party? [Exceptions 7, 8, 9, 10, 12, 13, 14, 15, 16, 17, 18, 19, 20]

3. Did the ALJ err in concluding Respondent violated Section 8(a)(1) of the Act by refusing to recognize and bargain with Charging Party and provide it with information requested by Charging Party? [Exceptions 12, 13, 14, 15, 16, 17, 18, 19, 20]

4. Did the ALJ err in concluding Respondent violated Section 8(a)(1) of the Act by threatening certain of its employees with discharge in order to discourage their support for Charging Party? [Exception 10]

STATEMENT OF FACTS

I. Background of Operations

In March 2016, PrimeFlight was awarded the contract to provide airline support services to JetBlue at JFK. PrimeFlight commenced providing those services on May 9, 2016. (Tr. at 216). The services PrimeFlight provides at JFK include wheelchair handling for disabled customers, skycap curbside check-in, baggage handling, and security line queue monitoring. (Tr. at 218). PrimeFlight provides these services under the terms of a General Terms Agreement ("GTA") executed by PrimeFlight and JetBlue, as well as a Statement of Work ("SOW") appended to the GTA. (Tr. at 223-225; Jt. Ex. 2).

a. PrimeFlight Begins Operations at JFK Providing Services to JetBlue Previously Provided by Air Serv and Pax Assist at JFK

PrimeFlight provides services at JFK that were previously provided to JetBlue by Air Serv Corporation and PAX Assist. Prior to PrimeFlight, Pax Assist provided the wheelchair services and Air Serv provided the other services, including sky cap, baggage handling, and line queue services. (Tr. at 218).

Matthew Barry, PrimeFlight Division Vice President, testified that upon being awarded the contract in March 2016 and in anticipation of the impending May 9 commencement of operations at the airport, PrimeFlight recruited, trained and hired approximately 364 employees. (Er. Ex. 4). Of the 364 employees initially hired, 189 were former AirServ employees. (Tr. at 229; Jt. Ex. 1).

Barry further testified that immediately after commencing the work, PrimeFlight understood that the staffing was insufficient "to manage the volume of requests that [PrimeFlight] would be receiving, in particular on the wheelchair operation" (Tr. at 230). The staffing problem was compounded by the fact that JetBlue had not clearly

communicated work that PrimeFlight would be responsible for handling, including employees who would work "hand-in-hand with the TSA for moving baggage that is being scanned." (Tr. at 231). Barry testified that as a result of the staffing problems, PrimeFlight "conservatively estimated" a need to hire an additional 250 people, and targeted about 500 employees total at JFK to be hired in two phases, the first in early June and the second in late June/ early July. (Tr. at 233, 236).

In fact, on May 13, 2016, a mere four days after PrimeFlight commenced operations at JFK, JetBlue Manager Christopher Kemmerer emailed PrimeFlight managers, including Matt Barry, acknowledging PrimeFlight's staffing shortage:

> … This evening.. we had 6 JetBlue Customer Service supervisors plus a duty manager pushing wheelchairs through our Customs hall.
>
> For leadership's awareness, we would like to see a shift breakdown of staffing by each position at the beginning of the AM and PM shift starting tomorrow through the weekend.
>
> We are prepared to supplement your staffing at certain positions so that you can throw that manpower into the wheelchair operation.

Er. Ex. 1(emphasis added).

Barry testified that the staffing problems continued "until [PrimeFlight] had the ability to hire additional folks." (Tr. at 238). Also in accordance with JetBlue's requirement for a "shift breakdown of staffing by each position," Barry testified that PrimeFlight provides an Excel report "on a daily basis to JetBlue and their leadership team that outlines and delineates, at a particular time of day, how many employees [PrimeFlight] actually, physically [has] on staff to perform the variety of functions that [PrimeFlight] is contracted for." (Tr. at 239).

On May 18, 2016, Barry emailed PrimeFlight managers at JFK that, among other things, they needed to focus on "**recruiting/training heavily."** (Er. Ex. 2). Barry testified

that he sent the email because of PrimeFlight's "concerns about not having enough staff to support the operation" mainly concerning the wheelchair positions. (Tr. at 241).

By June 16, 2016, PrimeFlight hired approximately 78 additional employees, only 8 of whom were former Air Serv employees. That means that by June 16, only 197 of the 440 employees at JFK were former Air Serv employees. (Tr. at 271; Jt. Ex. 1; Er. Ex. 4).[2]

b. SEIU 32BJ Demands Recognition for PrimeFlight's Wall-to-Wall Unit, Including Wheelchair Services Not Previously Represented

On May 23, 2016, well after PrimeFlight had made and begun implementing its decision to ramp up its workforce, Brent Garren, counsel for SEIU 32 BJ sent a letter to PrimeFlight demanding recognition by PrimeFlight as the labor representative for the former "Air Serv employees represented by Local 32BJ." Garren also demanded recognition for PrimeFlight's wheelchair services employees, who were not previously included the Union's purported bargaining unit:

> As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal 5 on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA.

(Jt. Ex. 3)

PrimeFlight Senior Vice President William Stejskal, responded by letter dated May 25, 2016 requesting that the Union provide evidence establishing the basis of its demand for recognition and bargaining. (Jt. Ex. 3). Stejskal also requested that the Union provide the NLRB certification and any applicable collective bargaining agreements. (Jt. Ex. 3). On

[2] Jt. Ex. 1 is a list of all Air Serv employees hired by June 16, 2016. Checking the former Air Serv employees listed in that exhibit with their hire dates listed in Er. Ex. 3 shows the following: (1) by May 7, 2016, PrimeFlight had hired approximately 362 total employees, 189 of whom were hired from Air Serv; (2) by June 16, 2016 PrimeFlight hired approximately 78 additional employees, only 8 of whom were former Air Serv employees.

June 2, the Union sent PrimeFlight a copy of a purported recognition agreement between the predecessor employer Air Serv and SEIU 32BJ. (Jt. Ex. 3). Stejskal responded in a June 10 letter acknowledging receipt and reiterating the request for any collective bargaining agreement. (Jt. Ex. 3). Garren sent the final correspondence on June 15 refusing to provide any further information and claiming that because the recognition agreement with Air Serv was entered into over six months prior it could not be legally challenged. (Jt. Ex. 3). [3]

II. PrimeFlight Provides Essential Airline Services to JetBlue

Since commencing operations at JFK on May 9, 2016, and continuing to today, PrimeFlight has provided various services directly for its client JetBlue at JFK. (Tr. at 216)

1. Wheelchair Services: PrimeFlight provides Wheelchair Services for JetBlue passengers requiring wheelchair transport in moving through the terminal. (Tr. at 218; Jt. Ex. 2 at 24.). These services include, but are not limited to servicing:

- "walk-up" customers requiring assistance by wheelchair;
- "planned" and "unplanned" customers requiring wheelchair assistance throughout the airport, including transport between gates;
- Customers who are waiting to board a flight or waiting for transportation; and,
- customers who need wheelchair to assistance making restroom and concession visits

Tr. at 218-219; Jt. Ex. 2 at 25, 26.

[3] It is noted that the ALJ quashed the vast majority of PrimeFlight's subpoena *duces tecum* to SEIU 32BJ and would not allow PrimeFlight to question witnesses regarding the nature of the Union's relationship with Air Serv, the predecessor employer at JFK. In so ruling, the ALJ incorrectly stated that "the nature of Local 32BJ's recognition is precluded by Section 10(b) of the Act." The six-month statute of limitations provided for in Section 10(b) pertains to the timing of conduct that is the subject of an unfair labor practice charge. Section 10(b) does not, however, limit the relevance of facts and evidence, which occur more than 6 months prior to the charge, if those facts provide context to unfair labor practice allegations.

2. Baggage Handling Services: PrimeFlight provides two types of baggage services, including curbside baggage check-in, also known as "Skycap" service, and traditional baggage handling inside the terminal where JetBlue operates. (Tr. at 217-218, 222; Jt. Ex. 2 at 23-26.) These services include, but are not limited to providing assistance with:

- baggage transfer services for JetBlue customers;
- baggage movement by preparing and identifying bags needing transfer in the airport;
- placing customer luggage onto baggage belts and into baggage system from behind the check-in counter; and,
- picking up and dropping off baggage to be taken to appropriate areas.

Tr. at 220-222; Jt. Ex. 2 at 26

3. Line Queue Monitoring:

PrimeFlight also provides employees for Line Queue Monitoring, providing line monitors for the passenger lines at security checkpoints run by the Transportation Safety Administration (Tr. at 220). These services include, but are not limited to, maintaining:

- the integrity of the queue system at each checkpoint;
- communication with the TSA on any JetBlue passenger issues: and,
- compliance with FAA carry-on compliance.

Jt. Ex. 2 at 26.

III. PrimeFlight Operates Its Business at JFK Under the Close Control of JetBlue

JetBlue exercises substantial control over nearly every aspect of PrimeFlight's JFK operations. As a threshold matter, the job duties of the PrimeFlight employees working at JFK are determined entirely by PrimeFlight's agreement with JetBlue to provide the

functions described in Section D, above. Beyond the tasks they perform, PrimeFlight employees' environment, supervision, hours, workload, training, clothing, and work records are under the direct control of JetBlue.

Physical Space: PrimeFlight's employees work entirely in physical space controlled by JetBlue, performing their duties in JFK's Terminal 5 to support JetBlue's airline operations. (Jt. Ex. 2 at 23). PrimeFlight has no physical space of its own at JFK and relies entirely on JetBlue for office space. (Tr. at 248-250). JetBlue also provides and controls the locker room where PrimeFlight employees store their personal belongings while at work, as well as the break room where PrimeFlight employees take their breaks. (Tr. at 249).

Training: PrimeFlight employees are trained on JetBlue-designed modules regarding JetBlue policies and procedures. (Tr. at 262). The GTA specifies that PrimeFlight "will send employees to JetBlue University ("JBU") for "Train the Trainer" training…" (Jt. Ex. 2 at 8.1). PrimeFlight's trainers must then ensure that every PrimeFlight employee receives "the required JetBlue provided curriculum initial training… prior to the employee performing any function on the behalf of JetBlue…" (Jt. Ex.2 at 8.6). PrimeFlight skycaps must also be trained in JetBlue's backup processes should a check-in system malfunction occur. (Jt. Ex. 2).

Equipment: JetBlue provides PrimeFlight's employees with equipment used at JFK, including traditional and aisle wheelchairs, baggage carts, tablets, radios, computers, and telephones. (Tr. at 252). JetBlue also provides PrimeFlight employees with internet service, as well as software or technology platforms necessary to perform job responsibilities. (Tr. 252).

PrimeFlight skycap employees are required to login to JetBlue's computer system ("Sabre") using a unique individual login in order to check-in customers, check seat

availability, issue seat assignments, and boarding passes, process any baggage fees collected, tag customer bags, issue receipts; etc. (Tr. at 257; Jt. Ex. 2).

Record-Keeping and Auditing: JetBlue has the right to inspect and audit PrimeFlight's "books, records, and manuals ... at all times." (Jt. Ex. 2 at 13.1, 13.2.) PrimeFlight is required by contract to provide JetBlue with copies of training records, workplace accidents and injuries, employee grievances, and employee disciplinary actions upon JetBlue's request. (Jt. Ex. 2 at 7.3) JetBlue has the right to access records that it requires PrimeFlight to maintain, including, but not limited to: electronic tracking of all JetBlue wheelchairs; tracking of customer wait times and complaints; number of hours worked by PrimeFlight employees; certifications of PrimeFlight employees quarterly training, etc. (Jt. Ex. 2 at 25, 28). Additionally, JetBlue requires that PrimeFlight provide JetBlue a daily shift report as well as daily, weekly and monthly accounting of all data pertaining to wheelchair services. (Jt. Ex. 2 at 25; Er. Ex. 6). Further, JetBlue requires that PrimeFlight track all customer wait times and complaints. (Jt. Ex. 2 at 25).

Discipline/ Termination: Although JetBlue has not yet exercised this authority, which is not surprising given the short period of time (about 5 months at the time of the hearing) that PrimeFlight has provided services at JFK, Barry testified om direct examination that JetBlue does have the authority to remove PrimeFlight employees from the airport contract:

> Q. With respect to JFK and JetBlue. If they ask you to remove an employee, what would your response be?
>
> A. My understanding is, per our general terms agreement, contract with them, if they were to request it then I would have to abide.

Tr. at 265.

Then, later on cross examination, Barry testified consistently as follows:

Q. You testified that JetBlue has never required PrimeFlight to terminate any employee at JFK, isn't that right?

A. Yes.

Q. However, I believe you testified that if that were to happen PrimeFlight would be required to terminate the employee under the agreement with JetBlue, isn't that right?

A. We would be required to remove them from their contract.

***

Q. Which provision in the agreement requires PrimeFlight to remove JFK employees at JetBlue's request?

A. 7.6

Section 7.6 of the GTA provides, in relevant part, as follows:

> If, at any time, any of the workers performing the Services shall be unable to work in harmony or shall interfere with any labor employed by JetBlue or any tenant of the area in which the services are performed, Business Partner shall take such reasonable steps as shall be necessary to resolve such dispute including but not limited to the removal and replacement of employees.

Work Schedules and Staffing Levels: JetBlue advises PrimeFlight of the number of flights JetBlue will have each day, how many wheelchair passengers JetBlue expects, and what times during the day PrimeFlight's employee positions need to be covered, including the ticket counter, security checkpoint, and baggage handling. (Tr. 243-245). JetBlue has an expectation for the minimum number of workers for each position, which leads directly to how many people PrimeFlight schedules and how many hours are scheduled. (Tr. at 244). JetBlue directs PrimeFlight employees with respect to assisting JetBlue customers who need wheelchair assistance. (Jt. Ex. 2 at 24). Section 9.1 of the GTA expressly requires that PrimeFlight maintain staffing to JetBlue's satisfaction:

> The parties acknowledge that JetBlue's flight activity may increase or decrease over the duration of the Term, and that it will be the responsibility

> of PrimeFlight to maintain appropriate levels of personnel and equipment to perform the Services in strict accordance with this Agreement, regardless of any such activity.

Jt. Ex. 2 at 9.

Workplace Supervision: JetBlue has the authority to require the removal of PrimeFlight employees from the workplace for disciplinary or performance reasons. (Tr. at 264). This authority is set forth in Section 7.6 of the GTA. (Tr. at 287; Jt. Ex. 2 at 6).

JetBlue's SOW with PrimeFlight imposes rules of conduct which PrimeFlight employees must observe in executing their duties at JetBlue's operation. For example, Skycaps must be "professionally dressed and neatly groomed." (Jt. Ex. 2 at 24.) The SOW further imposes restrictions on how Skycaps handle financial transactions and issue documentation to passengers. (Jt. Ex. 2 at 24.)

Wheelchair Assistants and baggage handlers are also required to dress and groom themselves appropriately under the SOW. (Jt. Ex. 2 at 25, 26.) Wheelchair Assistants are precluded from using their cell phones while working and from sleeping on duty. (Jt. Ex. 2 at 25.) The GTA further provides, "[PrimeFlight] shall enforce strict discipline and good order among its employees, to maintain and observe sound and harmonious business practices, and to take all reasonable steps to avoid labor disputes ...." (Jt. Ex. 2 at 7.6.)

Uniforms: Prior to commencing work on the contract at JFK, PrimeFlight first had to receive approval from JetBlue's branding department regarding the uniforms PrimeFlight employees were to wear. JetBlue has ongoing control over this — if PrimeFlight changes its uniforms, PrimeFlight must get approval from JetBlue. (Tr. at 253-256).

SUMMARY OF ARGUMENT

Under decades of precedent from the NMB and the NLRB, derivative carriers with PrimeFlight's factual profile easily meet the jurisdictional test for RLA jurisdiction, and as such, the NLRB has no jurisdiction to make findings regarding PrimeFlight's alleged unfair labor practices. Indeed, only a few years ago, the NLRB and the NMB found a nearly identical PrimeFlight operation at LaGuardia to be subject to the RLA, not the NLRA, and a contrary result here would defy logic and federal jurisprudential requirements for analytical consistency in federal agency proceedings. Therefore, to the extent the NMB, or by derivative analysis the NLRB, has changed analytical position in the past few years to heighten the RLA jurisdictional standard, the agencies have done so without explanation, and the NLRB may not apply the heightened standard here without a reasoned explanation for a major shift in decades of precedent. Such a change would create a splintered labor environment in the transportation carrier industry, defeating the intent of the RLA. Because PrimeFlight could not fall under NLRA jurisdiction, PrimeFligth could not violate Section 8(a)(1) of the NLRA in any way, whether by refusing to bargain with Charging Party, refusing to provide information to Charging Party, or threatening employees with discharge for supporting Charging Party.

Even were the NLRB to exert jurisdiction properly here, however, PrimeFlight is not a successor employer. At the time Charging Party demanded recognition, PrimeFlight had not hired a substantial complement of its employees, and no majority test could be properly applied. PrimeFlight had a pre-existing plan to hire substantial numbers of additional employees, and subsequently did so. Once PrimeFlight reached its substantial complement, Charging Party no longer had a presumptive majority.

ARGUMENT

I. Under Decades-Old NLRB Precedent, Respondent PrimeFlight Is a Derivative Carrier Under the Railway Labor Act and May Not Be Subjected to Jurisdiction Under the National Labor Relations Act.

As a threshold matter, PrimeFlight cannot commit an unfair labor practice under the NLRA because PrimeFlight is not covered by that statute. The NLRA excludes employers covered by the Railway Labor Act (RLA). See 29 U.S.C. § 151(2), (3); 45 U.S.C. §§ 151-188. The RLA "creates a special scheme to govern the labor relations of railroads and airlines because of their unique role in serving the traveling and shipping public in interstate commerce." Verrett v. SABRE Grp., Inc., 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999). The RLA is intended "to avoid any interruption to commerce" arising from labor disputes. 45 U.S.C. § 151a. "To serve each of these goals, the [National Mediation Board ("NMB")] investigates and resolves disputes arising among a carrier's employees as to who represents such employees in labor negotiations." Dist. 6, Int'l Union of Indus. v. Nat'l Mediation Bd. of U.S., 139 F. Supp. 2d 557, 560 (S.D.N.Y. 2001).

The Railway Labor Act, 45 U.S.C. §§ 151 et seq., also governs the labor relations of carrier-associated companies which provide services to common carriers that are typically and traditionally provided by the carriers themselves. See 45 U.S.C. § 151(1). The RLA's definition of covered "carriers" includes these carrier-associated companies – like PrimeFlight – that perform related services. The statute states:

> The term "carrier" includes . . . ***any company which is directly or indirectly owned or controlled by or under common control with any carrier*** by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad,

45 U.S.C. § 151, First (emphasis added).

These carrier-affiliated companies, known as "derivative carriers," are subject to the RLA so long as the derivative carrier meets a two-step test outlined by the federal courts and discussed further below. *See Verrett v. SABRE Grp., Inc.,* 70 F. Supp. 2d 1277, 1281 (N.D. Okla. 1999) ("When the activities of carrier affiliates are necessary to the operations of an air carrier, and a labor dispute at the affiliate could cripple airline operations, those affiliates must be subject to the RLA because such disruption is the very type of interruption to air commerce the RLA was designed to prevent."). The grouping of derivative carriers within the same labor relations scheme as common carriers serves the important federal policy of consistent treatment of like employers for the purpose of avoiding interruptions in the service of carriers critical to national and international commerce. *Id*.

A derivative carrier may not be subject to both the NLRA and the RLA. Coverage of an employer by the RLA, by definition, excludes that employer from the jurisdiction of the NLRB. See 29 U.S.C. § 152(2) ("The term "employer" ... shall not include [j any person subject to the Railway Labor Act ...."). In determining whether an employer that provides services to an air carrier is subject to the RLA, the National Mediation Board (NMB) applies a two-part test. "First, the NMB determines whether the nature of the work is that traditionally performed by employees of rail or air carriers. Second, the NMB determines whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. Both parts of the test must be satisfied for the NMB to assert jurisdiction." *Bradley Pac. Aviation, Inc.*, 34 NMB 119, 130 (Mar. 12, 2007); *see also Aircraft Servs. Int'l Group, Inc.*, 33 NMB 200 (2006). As shown herein, PrimeFlight satisfies the NMB's longstanding test, as well as that of the NLRB. Because PrimeFlight is a derivative carrier to JetBlue under RLA Section 151, the NLRB has no jurisdiction to conduct unfair labor practice proceedings against PrimeFlight as a respondent.

To the extent the NLRB has relied on the NMB's retraction of jurisdiction over derivative airline carriers, the NLRB must retreat from such reliance. As the Court of Appeals for the District of Columbia Circuit recently held, the NLRB's expansion of its jurisdiction violates federal rules applicable to the reasoning required of federal agencies in abandoning long-held principles. Further, continued assertions of jurisdiction by the NLRB in this area will create splintering of jurisdiction in an area long dominated by the NMB, exposing the national transportation system to labor unrest the RLA was designed to prevent.

A. Under the NMB's Longstanding Test for Carrier Control over a Derivative Carrier, PrimeFlight's JFK Operations Fall Under the Jurisdiction of the Railway Labor Act.

As the ALJ noted in her decision, no one disputes that PrimeFlight meets the first of the two factors for derivative carrier analysis. PrimeFlight's services to JetBlue at JFK include baggage handling, skycap, line and queue monitoring, and wheelchair assistance, and the General Counsel and the ALJ are in agreement that Respondent PrimeFlight meets the first factor, *i.e.*, its services provided to JetBlue at JFK are traditional airline carrier services. (ALJD p. 6, lines 30-36.) Therefore, the only question presented is whether PrimeFlight satisfied the "carrier control" standard. JetBlue plainly exercises the level of control required under the NMB's longstanding model for addressing RLA jurisdiction.[4]

Where, as here, the airline carrier involved does not own and is not commonly owned with the derivative carrier, the second factor in the function and control test turns on whether the airline carrier controls, directly or indirectly, the employer and its employees. In particular, the

[4] Although the ALJ applied a heightened standard for carrier control, citing a "shift" in NLRB and NMB analysis, PrimeFlight must be analyzed under the traditional model. The federal courts will not recognize the NLRB's new standard because neither the NLRB nor the NMB has provided an explanation for the change in analysis. *See ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F. 3d 1137 (D.C. Cir. 2017). The *ABM* case is discussed in detail below.

control factor focuses on the role that the carriers play in the company's daily operations and on the manner in which the employees perform their jobs. See, e.g., *Quality Aircraft Servs*., 24 NMB 286, 291 (1997). The factors that are considered include:

- Control over the manner in which the entity conducts its business, including access to the employer's operations and records;
- Involvement in hiring, firing and disciplinary decisions;
- Supervision and direction of the entity's employees in the performance of their job duties;
- Influence over the conditions of employment;
- Influence over employee training; and
- Control over uniform and appearance requirements.

See, e.g., *Automobile Distr. of Buffalo Inc. and Complete Auto Network,* 37 NMB 372, 378 (2010). The NMB has not stated whether any one factor is more probative than the others.[5]

It is clear, however, that not all of the factors must be present to meet the control test. In fact, in the large majority of NMB decisions, at least some factors have not been present.[6] As further analyzed in a ruling from the Southern District of New York, the court stated:

> While evidence of the degree of control and supervision of the carrier over the individual employee is relevant, it is not the end of the inquiry. Rather, in determining whether an entity is controlled by an air carrier, the NMB

[5] It should be noted that carrier control over employee compensation is not required to find RLA jurisdiction. See, e.g., *New York Interstate Serv., Inc*., 14 NMB 439, 441 (1987) (finding RLA jurisdiction even though employer "independently set[] the rates of pay and benefits its employees receive[d] [and] receive[d] monthly payments from [airline] which fluctuate[d] with the number of hours worked that month by [contractor] employees."); *John Menzies PLC d/b/a Ogden Ground Servs., Inc.*, 30 NMB 404, 408 (2003) (finding RLA jurisdiction even though employer determined the rates of pay and benefits for its employees).

[6] See, e.g. *Kannon Serv. Enters. Corp.*, 31 NMB 409, 417 (2004) (finding RLA jurisdiction even though employer determined which employees worked each shift; employees did not wear carrier uniforms; carriers did not directly supervise its employees; and carriers never requested the employer to discipline or remove employees); *Int'l Total Servs.*, 26 NMB 72, 76 (1998) (finding RLA jurisdiction even though employer hired and fired its own employees).

> considers factors including "the extent of the carrier control over the manner in which the company conducts its business; access to [the] company's operations and records; [the carrier's] role in personnel decisions; [the carrier's] degree of supervision over the company's employees; [the carrier's] control over employee training; [ ] whether company employees are held out to the public as employees of the carrier," *John Menzies*, 31 NMB. at 504-05, "the carrier's role in the entity's daily operations," "the entity's employees' performance of services for the carriers," and "the degree to which the carriers affect other conditions of employment," *Intl Total Servs.*, 26 NMB. 72, 75. See also *Andy Frain Servs., Inc.*, 19 NMB at 164 (listing similar factors).

Cunningham, 579 F. Supp. 2d at 542 (citations and elided/substituted portions in original). Moreover, it is the ***right*** to exercise control that is critical to the inquiry, even if that right has been exercised only occasionally — or not at all. *See, e.g., Intl Cargo Marketing Consultants, d/b/a Alliance Air*, 31 NMB 396, 407 (2004) (carrier's plan to require entity's employees to wear carrier's uniform, and entity's willingness to do so, cited as indicia of carrier control); *Command Security Corp.*, 27 NMB 581, 585 (2000) (analyzing carrier control based solely on provisions in contracts with carriers); *Huntleigh USA Corp*., 29 NMB 121 (2001) (citing carrier's authority under several provisions in the contract in finding company subject to RLA).

a. Control over the manner in which the entity conducts its business, including access to the employer's operations and records.

PrimeFlight employees perform their passenger services for JetBlue entirely within the terminal where JetBlue operates. Indeed, PrimeFlight has no physical space of its own and relies on JetBlue for all offices, storage, locker rooms, and break rooms. For its JFK operations, PrimeFlight operates at the direction of JetBlue, receiving flight schedules and wheelchair data from JetBlue which determine PrimeFlight's staffing levels, employee scheduling, and

wheelchair availability. PrimeFlight provides to JetBlue reports on staffing levels and the number of wheelchair interactions between PrimeFlight employees and passengers. JetBlue

management coordinates with PrimeFlight's supervisors on a daily basis to ensure that PrimeFlight provides the necessary wheelchair, line monitoring, and baggage services.

JetBlue has broad rights to access and audit PrimeFlight's records. In any subject which is directly related to the services provided to JetBlue by PrimeFlight, PrimeFlight is required to provide JetBlue with copies of records. Among the types of records JetBlue may access are core employment-related materials such as workplace accident and injury reports and employee disciplinary actions. JetBlue also has the right to audit and inspect the provision of services provided by PrimeFlight at JFK.

b. Involvement in hiring, firing and disciplinary decisions.

As established by Barry's testimony and the express terms of the GTA discussed in detail above, in the event JetBlue demands the removal of an employee from the workplace, which JetBlue has the right to do, PrimeFlight must terminate that employee.

c. Influence over the conditions of employment.

JetBlue exercises broad, constant influence over all workplace conditions for PrimeFlight employees. Employee shifts, schedules, and hours are set at the business demand of JetBlue, as are staffing levels determining employee workloads. The locker rooms and break rooms used by PrimeFlight employees are provided by JetBlue on property controlled by JetBlue.

In executing their job duties, which are designed specifically and only for JetBlue's passenger needs, PrimeFlight employees use equipment provided, controlled, and stored by JetBlue. JetBlue provides the wheelchairs used to transport passengers, the radios and telephones with which employees communicate, the baggage carts they use to transport baggage, and the computers and technology platform they use to accomplish and record their tasks.

d. Influence over the conditions of employment.

JetBlue requires that PrimeFlight provide its employees with all necessary initial and recurrent training to perform JetBlue passenger services. Beyond their work duties and PrimeFlight internal rules, PrimeFlight employees must learn JetBlue's policies and complete the training JetBlue gives its own employees.

e. Control over uniform and appearance requirements.

Prior to commencing work on the contract at JFK, PrimeFlight first had to receive approval from JetBlue's branding department regarding the uniforms PrimeFlight employees were to wear. JetBlue maintains ongoing control over PrimeFlight employee uniforms.

B. In 2008 the NMB and the NLRB Both Found a Nearly Identical PrimeFlight Operation at New York's LaGuardia Airport Subject to the RLA.

As mentioned by the ALJ below, the NLRB examined a virtually identical PrimeFlight relationship at LaGuardia Airport in New York City, nine miles from the JFK operation, in 2008.[7] The NLRB in that case, properly deferring to an NMB analysis of PrimeFlight, found that PrimeFlight's operations at LaGuardia fell clearly under the jurisdiction of the RLA and outside the jurisdiction of the NLRA. As discussed in more detail below, the PrimeFlight-LaGuardia operation was virtually indistinguishable from the PrimeFlight-JFK operation in terms of carrier control over contractor PrimeFlight, the only analytical factor currently in question for RLA jurisdiction over PrimeFlight-JFK in this case.

The ALJ in the instant case stated:

> In *PrimeFlight* [LaGuardia], supra, the contractor performed skycap, wheelchair, baggage, priority parcel, ticket verification, and passenger services for various airlines at LaGuardia Airport. (That is, essentially the same type of services that PrimeFlight provides in this case.) The [NLRB]

[7] For ease of reference and to avoid confusion, in this section of the brief, Respondent refers to the prior NMB and NLRB decisions relating to PrimeFlight's operations at LaGuardia Airport as "PrimeFlight-LaGuardia" and to PrimeFlight's operations in the current case as "PrimeFlight-JFK."

> requested the NMB to review the record in the representation case and that agency subsequently issued its opinion that the employer was subject to the Railway Labor Act. Considering the record in light of the NMB opinion, the Board dismissed the petition on the basis that the employer was subject to the Railway Labor Act.

ALJD p. 3 n.3, lines 46-52. The ALJ referred to an NLRB decision, which in turn deferred to an NMB decision. In the NLRB decision, *PrimeFlight Aviation Services*, 353 NLRB 467 (2008), the NLRB cited *PrimeFlight Aviation Services*, 34 NMB 175 (2007), to find PrimeFlight-LaGuardia subject to the RLA based on the control exercised over PrimeFlight-LaGuardia by airline carriers at LaGuardia.

Closer analysis of the 2008 NLRB and 2007 NMB decisions shows conclusively that, had the ALJ applied the same analysis here, she would have been bound to find PrimeFlight-JFK to be under the jurisdiction of the RLA. With respect to the NLRB's 2008 decision, the following chart shows a point by point comparison between the factors the NLRB found decisively to indicate RLA jurisdiction over PrimeFlight-LaGuardia vis-à-vis the factors demonstrated by the record evidence to apply currently to PrimeFlight-JFK:

Factors Demonstrating Air Carrier Control over PrimeFlight-LaGuardia in 2008 NLRB Decision	**Factors Demonstrating Air Carrier Control Over PrimeFlight-JFK in Record Evidence at ALJ Hearing in This Matter**
Carriers dictated PrimeFlight staffing levels by allotting certain hours on annual basis.	JetBlue dictates PrimeFlight staffing levels with a flight schedule for which PrimeFlight is responsible; JetBlue has staffing level expectations, which directly dictates how PrimeFlight staffs and schedules.
Carriers dictated fluctuations in PrimeFlight staffing levels by making changes in flights schedules to which PrimeFlight had to adjust.	JetBlue dictates fluctuations in PrimeFlight staffing levels by making changes in flight schedules to which PrimeFlight had to adjust; under their contract, JetBlue may increase or decrease activity, and PrimeFlight must maintain appropriate levels of personnel and equipment to the activity level.

Factors Demonstrating Air Carrier Control over PrimeFlight-LaGuardia in 2008 NLRB Decision	Factors Demonstrating Air Carrier Control Over PrimeFlight-JFK in Record Evidence at ALJ Hearing in This Matter
Carriers regularly changed daily assignments of PrimeFlight employees based on carrier needs.	JetBlue may increase/decrease flight activity; PrimeFlight must maintain personnel and equipment appropriate for the activity level.
Carriers communicated staffing changes to PrimeFlight through email, telephone, or direct communication.	JetBlue requires that PrimeFlight provide JetBlue a daily shift report to monitor staffing.
Carriers dictated type of training PrimeFlight employees must receive and provide "train-the-trainer" instruction to allow PrimeFlight trainers to train PrimeFlight employees.	PrimeFlight employees train on JetBlue policies and procedures; PrimeFlight must send employees to JetBlue for "Train the Trainer" training, and PrimeFlight's trainers then ensure that all PrimeFlight employees receive the JetBlue curriculum.
Carriers required PrimeFlight to maintain training records, which carriers could audit and verify at any time.	JetBlue has the right to inspect and audit PrimeFlight's books, records, and manuals at all times; PrimeFlight is required to provide JetBlue with copies of training records, workplace accidents and injuries, employee grievances, and employee disciplinary actions upon JetBlue's request; JetBlue has the right to access all records it requires PrimeFlight to maintain.
Carriers "effectively retain the right to have [PrimeFlight] remove an employee from their account, or even to terminate the employee …"	JetBlue has the authority to require the removal of PrimeFlight employees from the workplace for disciplinary or performance reasons. JetBlue's contract with PrimeFlight imposes rules of conduct which PrimeFlight employees must observe in executing their duties at JetBlue's operation.
Some PrimeFlight employees wore carrier uniforms, and the carriers approved the PrimeFlight uniforms of other PrimeFlight employees.	JetBlue has approval authority over PrimeFlight's employee uniforms; JetBlue has ongoing control over this.

See PrimeFlight Aviation Services, 353 NLRB at 467.

In its prior *PrimeFlight-LaGuardia* decision, the NMB likewise found sufficient carrier control to establish RLA jurisdiction based on the following:

Factors Demonstrating Air Carrier Control over PrimeFlight-LaGuardia in 2007 NMB Decision	Factors Demonstrating Air Carrier Control Over PrimeFlight-JFK in Record Evidence at ALJ Hearing in This Matter
Carriers required PrimeFlight-LaGuardia to maintain records of employees who have successfully completed the Carrier-mandated training. Carriers had access to PrimeFlight-LaGuardia employee training records.	JetBlue is contractually authorized to inspect and audit PrimeFlight-JFK's "books, records, and manuals… at all times."
Carrier representatives trained and designated PrimeFlight-LaGuardia employees as Carrier trainers who, in turn, trained other PrimeFlight-LaGuardia employees.	JetBlue instructs PrimeFlight-JFK to provide its employees with all necessary initial and recurrent training to perform JetBlue passenger services.
Carriers' schedules dictated the staffing levels and shift assignments of PrimeFlight-LaGuardia employees.	JetBlue interacts frequently and continuously with and directs the work of PrimeFlight-JFK's employees. JetBlue exercises broad, constant influence over all workplace conditions for PrimeFlight-JFK employees, including setting PrimeFlight-JFK employee shifts, schedules, and hours, as well as staffing levels.
Carrier officials made changes in PrimeFlight-LaGuardia daily assignments regularly.	JetBlue makes radio calls to PrimeFlight-JFK employees who must answer the calls in order to receive instructions about providing passenger services. JetBlue exercises broad, constant influence over all workplace conditions for PrimeFlight-JFK employees, including setting PrimeFlight-JFK employee shifts, schedules, and hours, as well as staffing levels.
Although PrimeFlight-LaGuardia hired its own employees and set their wages and benefits, the Carriers reported problems with PrimeFlight's employees.	JetBlue makes radio calls to PrimeFlight-JFK employees who must answer the calls in order to receive instructions about providing passenger services.
PrimeFlight-LaGuardia complied with the Carrier's request to reassign a PrimeFlight-LaGuardia employee.	JetBlue retained the right to require PrimeFlight to remove or re-assign employees.

Factors Demonstrating Air Carrier Control over PrimeFlight-LaGuardia in 2007 NMB Decision	Factors Demonstrating Air Carrier Control Over PrimeFlight-JFK in Record Evidence at ALJ Hearing in This Matter
PrimeFlight-LaGuardia baggage service agents and priority parcel service employees wore Carrier uniforms, while the remainder of PrimeFlight-LaGuardia employees wore PrimeFlight-LaGuardia uniforms approved by the Carriers.	JetBlue approves the uniforms PrimeFlight-JFK employees are permitted to wear and retains control over future changes. JetBlue provides PrimeFlight-JFK space and equipment including locker rooms and break rooms, wheelchairs, radios, and telephones, baggage carts, computers and technology platform.

See PrimeFlight Aviation Services, 34 NMB at 182-183.

Not only does carrier control over PrimeFlight-JFK far exceed the level found sufficient by the NMB for RLA jurisdiction in many of the cases cited in Section I.A., above, but ***this very same contractor*** was found by the NLRB and the NMB to be subject to the RLA less than a decade ago at another New York City airport merely nine miles away. As discussed further in the next section, and as recently held by a Circuit Court of Appeals analyzing this very question, there is no rational explanation for the change in analysis leading to the opposite result in this case on virtually the same facts – and as such, the NLRB cannot reasonably adopt such a change in analysis under longstanding precedent for federal agencies.

C. The NLRB Has Contravened Mandatory Analytical Requirements for Federal Agencies by Usurping Jurisdiction from the NMB in Recent Years by Requiring "Meaningful Personnel Control" on the Part of the Air Carrier for RLA Jurisdiction.

As the ALJ tacitly implied in her decision, had this very same matter appeared before her a few years ago, the above analysis by the NLRB and the NMB would likely have dictated the opposite result; under the NLRB and NMB decisions regarding PrimeFlight-LaGuardia, as well as the wealth of NMB decisions giving the NMB broad jurisdiction over airline carrier

subcontractors, the ALJ would have inexorably found PrimeFlight-JFK to be an RLA employer expressly excluded from the jurisdiction of the NLRA.[8]

In justifying the starkly dissonant results, the ALJ referred repeatedly to a "shift" in the NLRB's analysis of the respective jurisdictions of the RLA and NLRA – over the past four years, the NLRB has taken advantage of an unexplained retraction of jurisdiction by the NMB, creating a splintering effect in the airline contractor industry. Airline support services which for decades were well within RLA jurisdiction, for critical and obvious policy reasons, have become fair game for the NLRB to assert power over. Various labor industry commentators observed this development with interest. *See, e.g.*, Brent Garren, *NLRA and RLA Jurisdiction over Airline Independent Contractors: Back on Course*, 31 ABA J. Lab. & Emp. L. 77, 91 (2015).

The District of Columbia Circuit Court of Appeals recently weighed in on the issue with a thorough opinion explaining why the NLRB's expansion of its jurisdiction over airline subcontractors not only contravene the intent of the RLA, but do so with no rational explanation by the NLRB of its encroachment on traditional NMB turf. *See ABM Onsite Services-West, Inc. v. National Labor Relations Board*, 849 F. 3d 1137 (D.C. Cir. 2017). In analyzing the historical basis of the RLA and its relationship to national commerce, the *ABM* Court's opinion offers an excellent perspective on the rationale for having airline carrier subcontractors subject to RLA jurisdiction, as well as a critical touchstone for the NLRB to re-evaluate its encroachment on the NMB's area of expertise.

[8] At Note 5 of her decision, the ALJ stated that she found the 2008 NLRB *PrimeFlight* decision "not to be controlling here due to the different factual contexts and the above-mentioned shift in jurisdictional analysis." (ALJD p. 10 n.5, lines 50-52.) The ALJ provided no comparison of such "factual contexts," however, relating to PrimeFlight-LaGuardia vis-à-vis PrimeFlight-JFK. As amply demonstrated above, there is no meaningful distinction between the two under the NMB's traditional approach.

ABM involved an airline contractor providing baggage handling services to airlines at Portland International Airport. The NLRB had subjected the contractor to NLRA jurisdiction despite the contractor's obvious satisfaction of the traditional NMB standard for RLA jurisdiction, specifically carrier control of the contractor's operations. *See ABM*, 849 F. 3d 1140-41, 1144 ("Under [the traditional] test, ABM would plainly fall under the control of air carriers."). The *ABM* Court began its analysis by reiterating the essential purpose of the RLA: to protect "the traveling and shipping public in interstate commerce" by avoiding the disruption of airlines and railways by labor disputes. *ABM*, 849 F. 3d at 1139. For that reason, the ABM court further noted that the U.S. Supreme Court once observed that "the major purpose of Congress in passing the Railway Labor Act was to provide a machinery to prevent strikes." *Id*. (quoting *Tex. & New Orleans R.R. v. Bhd. Of Ry. & S.S. Clerks*, 281 U.S. 548, 565 (1930)). The RLA restricts the right of employees subject to it to engage in work stoppages, in order to "keep transportation moving."[9] ABM, 849 F. 3d at 1140.

For this reason, the NMB has historically taken a broad view of its jurisdiction and that of the RLA over contractors such as PrimeFlight. As shown in Section I.A., above, the NMB cast a wide net in finding RLA jurisdiction over contractors performing baggage handling and passenger assistance duties. From the late 1990s through 2011, the NMB found "RLA jurisdiction in all but one of over thirty airline-control cases." Garren, *supra*, at 93 & n. 133 (collecting citations); *see also John Menzies, Plc d/b/a Ogden Servs., Inc.*, 31 NMB 490, 506 (Aug. 26, 2004) (citing numerous decisions in which the NMB "has found that the airline service

[9] It is no surprise, therefore, that unions such as Charging Party strongly prefer NLRA jurisdiction; union power is built on the power to disrupt employer operations. In terms of the impact on transportation and commerce, a union strike at a contractor such as PrimeFlight is no different than a strike on the carrier itself. When the contractor's baggage handlers and wheelchair escorts walk off the job, the effect on passengers is no different than it would be if the baggage handlers and wheelchair escorts were employed by the carrier itself: the processing of baggage and passengers is effectively shut down until replacements are retained or the contractor bows to the union's demands in order to end the strike.

companies fall within the RLA's jurisdiction because a carrier or carriers exercise significant control over the airline service companies' operation at a particular airport"). The NMB adopted its current two-part test for coverage of airline contractors in the early 1980s. At the time, the NMB explained it had "undertaken an extensive evaluation of its jurisdictional standards" and that "[r]ecent jurisdictional determinations of this Board have been made in light of changing corporate relationships and increasing use of contractors to perform work integral to rail and air transportation." *Bhd. Ry. Carmen*, 8 NMB 58, 61 (Oct. 15, 1980). A modicum of carrier control over the contractor sufficed to confer jurisdiction, because any significant interrelation of operations between airline and contractor exposes the airline to the disruption of a strike by the contractor's employees.

The NMB abruptly diverged from this nearly three-decade course beginning in 2012. "Between 2012 and 2014, the NMB found no RLA jurisdiction over [airline contractors] in six cases." Garren, *supra*, at 100 & n. 189 (collecting cases). The NMB now declines RLA jurisdiction in all cases in which a contractor has only an allegedly "typical subcontracting relationship" with an air carrier. *See e.g.*, *Airway Cleaners, LLC*, 41 NMB 262, 268 (Sept. 11, 2014) (stating a "carrier must exercise 'meaningful control over personnel decisions,'" and not exercise only "the type of control found in any contract for services" to establish RLA jurisdiction"); *see also* Garren, *supra*, at 103 ("[T]he *Airway Cleaners* test—that a "typical" [airline contractor] is exempt from RLA jurisdiction—***seems inconsistent with more than thirty decisions from 1996-2011 that found RLA jurisdiction over [airline contractors]*"** (emphasis added)).

The result for thousands of airline contractors is that the NMB has changed its position to reduce its jurisdiction and that of the RLA over airline contractors, with a corresponding expansion of jurisdiction by the NLRB to extend the reach of the NLRA – changes the ABM

court found literally inexplicable. The *ABM* court first examined the common-sense process by which the NLRB and the NMB had sorted out jurisdictional questions for many years:

> Whether a company is controlled by a carrier [] is often unclear. Thus, "the NLRB and the NMB have, in the absence of any statute addressing the point, jointly developed their own method for determining their mutual jurisdictional question of whether the NLRA or the RLA governs" in any given case. The NLRB frequently refers the jurisdictional question to the NMB for an advisory opinion and then defers to the NMB's view, based on the NMB's expertise in administering the RLA. The NLRB follows this accepted practice when a party raises a colorable claim that the NLRB lacks jurisdiction.[10]

ABM, 849 F. 3d at 1140 (citations omitted).

The *ABM* court then analyzed the "clear departure from precedent" embarked upon by the NMB in 2013, when that agency changed its model for analyzing carrier control over contractors. *Id*. at 1144. Following decades of affirmative carrier control decisions where the carrier had no direct input into disciplinary matters involving contractor employees, "the NMB in 2013 began requiring that air carriers exercise a substantial "degree of control over the firing [ ] and discipline of a company's employees" before it would find that company subject to the RLA." *Id*. (citation omitted).

The *ABM* court also noted that the NMB's unexplained alteration of the jurisdictional landscape had not gone unremarked upon by NMB and NLRB Members. In a separate case involving Respondent PrimeFlight, Member Harry I. Johnson of the NLRB had raised internally "a shift by the NMB [away] from earlier opinions in which it had asserted jurisdiction on similar grounds." *See PrimeFlight Aviation Services, Inc*., 12-RC-113687, slip op. at 1 (June 18, 2015). Member Nicholas Geale of the NMB, meanwhile, had repeatedly commented on the NMB's growing over-reliance on "the absence of substantial control over 'the firing and discipline of a

[10] In the instant case, it is not credible that Region 29 did not detect at least a "colorable claim" of RLA jurisdiction when one considers the result of the proceedings involving PrimeFlight's nearly identical operations at LaGuardia Airport.

company's employee's' to determine whether an airline carrier had the requisite control over a contractor. *See* ABM 849 F. 3d at 1145 (quoting Member Geale in *Airway Cleaners,* 41 NMB at 275-76 (2014) and noting similar comments in *Menzies Aviation, Inc.*, 42 NMB at 8 (2014)). Ultimately, the ABM court found, the NMB's change in analysis, and the resulting change at the NLRB, created a glaring change in course without any policy or analytical basis: "These cases and commentary from members of both boards demonstrate ... the NMB will not find control for RLA purposes if the contractor is ultimately allowed 'to determine the appropriate discipline' for its own employees. That rule is impossible to square with cases from just a few years earlier." *See ABM*, 849 F. 3d at 1145.

Based on the NMB's abrupt change to its jurisdictional principles, and the NLRB's unexplained adoption of the change, the *ABM* court held that the NLRB had "violated [a] cardinal rule here by applying a new test to determine whether the RLA applies, without explaining its reasons for doing so." *Id*. at 1142. "It is well-settled that the NLRB—like any other agency—cannot "turn[ ] its back on its own precedent and policy without reasoned explanation." *Id*. at 1146 (quoting *Dupuy v. NLRB*, 806 F. 3d 556, 563 (D.C. Cir. 2015)). Despite the NLRB's practice of following the NMB's jurisdictional model, the *ABM* court ruled that the NLRB could not simply follow a substantial change to that model where the NMB had provided no explanation for it. To do so would equate to the NLRB's making such an unexplained change:

> Because the NLRB follows the NMB's lead in interpreting and applying the RLA, the question becomes how to treat an unacknowledged and unexplained deviation from precedent by the NLRB that is precipitated by a likewise unacknowledged and unexplained deviation from precedent by the NMB. We hold that, under such circumstances, the NLRB is not free to simply adopt the NMB's new approach without offering a reasoned explanation for that shift. Indeed, an agency cannot avoid its duty to explain a departure from its own precedent simply by pointing to another agency's unexplained departure from precedent.

Id. at 1146-47.

D. This Board Should Return to the Defensible Pre-2013 Standard for Carrier Control Set by the NMB Over Decades of Careful Analysis.

In making the analytical shift discussed above, neither the NMB or the NLRB demonstrated sufficient consideration for the impact their longstanding policies had on serious reliance interests on the part of airline carriers and their contractor employers, interests which are of critical importance given the essential function of the RLA. The result of the unexplained change in jurisdictional analysis will be a growing patchwork of traditionally carrier-oriented service employees with legal rights that are jarringly different from those of employees working the exact same jobs, often at the same airport.

This splintering effect is amply demonstrated by examining the PrimeFlight workforces at LaGuardia and JFK, as discussed in Section I.B., above. In the first case, at LaGuardia, PrimeFlight employees serving multiple airline carriers are subject to the RLA. As a result, PrimeFlight's LaGuardia workforce guarantees relative stability to the airlines served there, even in the event of labor unrest. "[U]nder the RLA, both employers and employees must exhaust an extended negotiation and mediation process before they can lawfully resort to self-help measures, such as unilaterally altering working conditions or calling a strike." *ABM*, 849 F. 3d at 1139-40.

In contrast, only nine miles away at JFK International Airport, the same classifications, performing the same job duties under the same degree of oversight by JetBlue, would be subject to the NLRA, with the right to strike over a labor dispute during any period in which a collective bargaining agreement is lapsed or otherwise not in effect. The perverse result of the NMB's and NLRB's unexplained change in position is that the airline served by PrimeFlight at JFK, JetBlue, would be paralyzed by a strike of PrimeFlight employees, while nine miles away, the LaGuardia

carriers would continue to operate unencumbered, despite using the same contractor with the same personnel structure.

The NMB analysis discussed in Section I.A., above, was a sensible, logical approach to the application of the RLA to employers with close ties to the airline carriers. The NLRB should return to that standard until such time as the NMB provides a compelling rationale for adopting a new standard.

II. Analysis of PrimeFlight's Full Complement of Employees Demonstrates That Predecessor Employees Comprise Less Than 40% of the Appropriate Unit.

Generally speaking, in order for a new employer to be a successor to the bargaining obligations of a predecessor employer, there must be a finding of a presumptive continued majority status on the part of the labor organization involved. See *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 280-81 (1972) (stating standard that union representation of "a majority of the employees hired by the new employer" establishes presumptive bargaining obligation with incumbent union). To establish successorship status, a majority of employees in the successor employer's bargaining unit must have been employed by the predecessor. The timing of that calculation is appropriate when a substantial and representative complement exists. See *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 27 (1987). The Board should consider the following factors in making that determination:

- whether the job classifications designated for the operation were filled or substantially filled;
- whether the operation was in normal or substantially normal production;
- the size of the complement on that date and the time expected to elapse before a substantially larger complement would be at work; and,
- the relative certainty of the employer's expected expansion.

See Fall River Dyeing Corp, supra at 48-49. The Board has held that it is appropriate to delay the bargaining obligation determination where the new employer expects with reasonable certainty to substantially increase its employee complement within a relatively short period of time. *Myers Custom Products*, 278 NLRB 636 (1986).

A. Charging Party Issued Its Demand for Recognition Prior to Respondent Reaching Its Substantial Complement of Employees at the JFK Operation.

As alleged in the Amended Complaint, on May 23, 2016 SEIU 32BJ demanded recognition by PrimeFlight as the labor representative for the former "Air Serv employees represented by Local 32BJ." SEIU 32BJ's demand included a demand for recognition of PrimeFlight's Wheelchair Services employees:

> As we understand it, the appropriate bargaining unit also includes employees providing wheelchair assistance. We request recognition for a unit of all full-time and regular part-time employees at Terminal 5 on the Jet Blue account, excluding supervisors, office clericals, and guards as defined in the NLRA.

See, Jt. Ex. 3. In other words, SEIU 32BJ demanded that PrimeFlight recognize SEIU 32BJ as the union representing a wall-to-wall unit of PrimeFlight's employees. NLRB Region 29's Amended Complaint recognizes the same wall-to-wall unit as alleged to be appropriate for recognition. Paragraph 8 of the Amended Complaint states, "The following employees of Respondent [PrimeFlight] ("the Unit") constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the [NLRA]:

> All full-time and regular part-time employees employed by Respondent at JFK Airport, excluding confidential employees, office clericals, guards and supervisors, as defined by the Act.

As a threshold factual consideration, therefore, the Wheelchair Services employees, a classification not represented by SEIU 32BJ at Air Serv, are irrefutably a critical part of the proposed bargaining unit. Key to evaluating PrimeFlight's proper complement of employees,

then, is the fact that PrimeFlight did not reach that complement until it had added the new classification of Wheelchair Services to the prior operation and hired hundreds of previously unrepresented employees into that classification

As stated, upon taking over the JetBlue contract and beginning operations, PrimeFlight determined that it needed 500 employees to be hired in two additional phases beyond the initial hiring done by PrimeFlight prior to beginning operations. The first phase of hiring had occurred in April 2016, prior to PrimeFlight's beginning operations. The second phase occurred in early June 2016, and the third phase occurred in mid- and late June 2016.

With respect to the first phase of hiring prior to the May 9 start-up date, hired approximately 362 employees (Er. Ex. 4). And, during that initial hiring phase, PrimeFlight hired approximately 189 former AirServ employees. Jt. Ex. 1. While a few former AirServ employees were hired into Wheelchair Services, this was a change in position for the former Air Serv employees because Pax Assist, not Air Serv, provided those services previously. (Tr. at 218).

Heavy hiring continued in early June to accommodate the massive demand for Wheelchair Services. In a matter of four weeks following PrimeFlight's initiation of operations at JFK, by June 16, 2016, the size of the employee complement increased substantially from 362 to 440 while the number of predecessor employees from Air Serv increased by only eight employees, to 197 total and the percentage of predecessor employees from Air Serv was not a majority of the workforce as of June 16, 2016. (Er. Ex. 5 and Jt. Ex. 1). In fact, expansion was a foregone conclusion, and with at least 440 employees on June 16, 2016, the percentage of predecessor employees in the unit requested by SEIU 32BJ was 44% (197 divided by 440). Consequently, PrimeFlight is not a successor to Air Serv and no bargaining obligation exists.

B. The ALJ Circumvented the Hiring Realities of PrimeFlight's JFK Operations by Making Unsupported and Illogical Assumptions About the Motivation for PrimeFlight's Hiring Decisions.

In finding that PrimeFlight had hired a substantial complement of its employees prior to Charging Party's demand for recognition, the ALJ appeared largely swayed by her conclusion that PrimeFlight made numerous hires after receiving the recognition demand from Charging Party – which to the ALJ automatically equated to evading a showing of majority support:

> Respondent's argument, supported primarily through the testimony of [PrimeFlight Vice President Matthew] Barry, that upon commencing operations PrimeFlight had determined a need to hire additional employees in total of an excess of 500 employees is unsupported in the factual record. Barry's testimony is conclusionary and vague. There is no document in evidence or evidence of other communications among PrimeFlight principals to show that this was an eventual goal undertaken at the outset of operations, The hiring of additional employees did not commence until after the Union's initial demand for recognition and bargaining, and there is no convincing evidence that it contemplated doing so prior to that date.

(ALJD p. 16, lines 26-33.) In other words, the ALJ inextricably intertwined her finding of successor employer status with her blunt but unsupported assumption that PrimeFlight increased staffing for the specific purpose of avoiding union representation of its employees. What this actually means, of course, is that the ALJ simply decided not to believe Barry's uncontradicted testimony, which was supported by various e-mails and conversations between PrimeFlight and JetBlue managers.

The ALJ's findings are fatally flawed on multiple bases: (1) Despite a four-month investigation involving multiple unfair labor practice charges and several position statements and submissions of evidence by Respondent, Region 29's complaint and amended complaint never even suggested PrimeFlight made its post-May 23 hires for the purpose of defeating Charging Party's majority status; (2) there is literally no evidence in the record to support the ALJ's stated suspicion that PrimeFlight made hiring decisions in response to a union demand for recognition;

(3) the conclusion is absurd on its face because of the massive expense and inconvenience involved in undertaking such hiring; and (4) the ALJ relied on this assumption despite its being unrelated to the test for successorship.

The first two issues with the ALJ's suggestion are easily resolved: The CGC never raised the issue before or at the hearing, nor was any evidence sought or adduced by the CGC on this issue.[11] No testimony or documentation of any kind supports the ALJ's stated suspicion – there is no credibility issue to resolve and no evidence to weigh in reaching the ALJ's result. In every type of employment motivation inquiry, while the timing of employment decisions may contribute to a the threshold question of a *prima facie* inference of unlawful motivation, timing standing alone cannot determined a decision against the employer, as it obviously did here.

As to the third issue, the ALJ's assumption betrays a fundamental misunderstanding of employer motivation: The suggestion is that PrimeFlight hired ***78 additional employees*** to defeat Charging Party's representation demand; that is to say, PrimeFlight was willing to increase its JFK payroll by a whopping 22% because of this presumed anti-union animus. Assuming each of those employees made New York's 2016 minimum wage of $9.00 per hour – though they make significantly more than that – those 78 employees would impose an annual payroll increase, in wages alone, of ***more than $1.4 million***, a number that does not factor in payroll taxes, administrative costs, and benefits. The real cost of those 78 employees would be more than $2 million annually in an operation where PrimeFlight's profits are limited by its contractual reimbursement from JetBlue. Suggesting that PrimeFlight would incur an expense of more than $2 million each year to avoid having Charging Party represent its employees is ludicrous.

[11] In theory, the GC could have made an allegation of an unlawful scheme to hire the union into minority status, then lay off part of the work force, which could be unlawful. But the GC made no such allegation in the complaint, and as indicated in Barry's testimony, PrimeFlight retained its mid-2016 hires.

Regarding the fourth fatal flaw in the ALJ's assumption, the employer's motivation in hiring does not, by itself, factor into the *Fall River* analysis. While there is NLRB precedent for analyzing successor employer schemes to defeat an incumbent union's majority status, those precedents require actual evidence of such a scheme, as well as a genuine analysis of that evidence. An ALJ's unsupported suspicions, particularly where the CGC has not even suggested the theory in the complaint, have no place in determining critical successorship issues. While the CGC will argue that the ALJ's successorship findings stand on their own, there is no reason for the ALJ to have inserted her suspicions into her findings at all, unless those suspicions played a significant role in her findings. The test for successorship under NLRB precedent does not involve the employer's motive in making hires – a union either does or does not have majority support among the employee complement on the appropriate date for analyzing the matter.

CONCLUSION

PrimeFlight has no bargaining relationship with Charging Party, because PrimeFlight is not subject to the NLRA. Therefore, PrimeFlight could not possibly violate Section 8(a) of the NLRA, whether by refusing to bargain with Charging Party, by refusing to provide information to Charging Party, or by allegedly threatening PrimeFlight's employees relating to Charging Party. In any event, PrimeFlight was not a successor employer for purposes of recognizing Charging Party as a labor representative and again, could not be held responsible for refusing to bargain with or provide information to Charging Party.

For all of the foregoing reasons, the Board should reverse the ALJ and dismiss the Complaint against Respondent in its entirety.

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

By: /s/ *Frank Birchfield*

Frank Birchfield, Esq.
1745 Broadway, 22nd Floor
New York, NY 10019
Telephone: (212) 492-2518
Facsimile: (212) 492-2501
william.birchfield@ogletreedeakins.com

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on May 15, 2017, a copy of the foregoing Respondent's *Brief in Support of its Exceptions to the Decision of the Administrative Law Judge and its Request for Oral Argument* has been filed via electronic filing with:

Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

and served via e-mail upon:

Brent Garren
Deputy General Counsel
SEIU Local 32BJ
25 West 18th Street, 5th Floor
New York, NY 10011-4676
Email: bgarren@seiu32bj.org

Kathy King
Regional Director
National Labor Relations Board
Region 29
Two Metro Tech Center, Suite 5100
Brooklyn, NY 11201
Email: Kathy.King@nlrb.gov

Brady Francisco-FitzMaurice
Field Attorney
National Labor Relations Board
Region 29
Two Metro Tech Center, Suite 5100
Brooklyn, NY 11201
Email: Brady.Francisco-FitzMaurice@nlrb.gov

/s/ *Frank Birchfield*

29824021.1